

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

W.O., a minor, by and through her guardian ad litem, SHANNA OVERCAST,

CASE NO. 10 CV 0632 MMA (RBB)

**ORDER GRANTING PLAINTIFF'S
MOTION FOR LEAVE TO FILE
FIRST AMENDED COMPLAINT**

UNITED STATES OF AMERICA, and
DOES 1-100,

[Doc. No. 15]

Defendants.

Currently before the Court is Plaintiff's motion for leave to file a first amended complaint to add two newly discovered defendants, Atlas Tree Service, Inc. and The Davey Tree Expert Company. For the reasons set forth below, the Court **GRANTS** Plaintiff's motion.

BACKGROUND

Plaintiff, a minor proceeding through her guardian ad litem, Shanna Overcast, initiated the present action on March 24, 2010 against the United States of America for injuries she allegedly sustained while visiting Fort Rosecrans National Cemetery when a tombstone collapsed on her leg and ankle. [Doc. No. 1.] Plaintiff asserts a tree and its roots adjacent to the tombstone caused the tombstone to collapse. [Id.; Doc. No. 15-2 ¶4.] On November 5, 2010, Plaintiff deposed Kirk Leopard, the Director of Fort Rosecrans National Cemetery. [Doc. Nos. 15, 15-2 ¶4, 15-3.] During the deposition, Mr. Leopard indicated Atlas Tree Service, Inc. and The Davey Tree Expert Company are responsible for evaluating and maintaining the trees on the cemetery grounds. [Doc.

1 No. 15-3.] Accordingly, on December 10, 2010 Plaintiff timely filed the present motion seeking
 2 leave to file a first amended complaint (“FAC”) to add these two companies as defendants.¹
 3 Defendant United States of America does not oppose Plaintiff’s request. [Doc. No. 15, p.5.]

4 **LEGAL STANDARD**

5 Rule 15(a) of the Federal Rules of Civil Procedure provides that after a responsive pleading
 6 has been served, a party may amend its complaint only with leave of court, and leave “shall be
 7 freely given when justice so requires.” Fed. R. Civ. P. 15(a). Granting leave to amend rests in the
 8 sound discretion of the district court. *Pisciotta v. Teledyne Industries, Inc.*, 91 F.3d 1326, 1331
 9 (9th Cir. 1996). Although the rule should be interpreted with extreme liberality, leave to amend is
 10 not to be granted automatically. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990)
 11 (citations omitted). Courts typically consider five factors when determining the propriety of a
 12 motion for leave to amend, including: (1) bad faith by the moving party, (2) undue delay in
 13 seeking leave to amend, (3) prejudice to the opposing party, (4) futility of amendment, and (5)
 14 whether the plaintiff has previously amended the complaint. *Johnson v. Buckley*, 356 F.3d 1067,
 15 1077 (9th Cir. 2004). Whether leave to amend should be granted “is not dependent on whether the
 16 amendment will add causes of action or parties.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183,
 17 186 (9th Cir. 1987). However, “[p]rejudice to the opposing party is the most important factor.”
 18 *Jackson*, 902 F.2d at 1387 (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321,
 19 330–31 (1971)).

20 **DISCUSSION**

21 Applying the five factor analysis to the facts at issue here, the Court finds leave to amend is
 22 warranted. First, the record does not demonstrate any bad faith or undue delay by Plaintiff.
 23 Nothing suggests Plaintiff reasonably could have known at the time she filed her original
 24 complaint that, Fort Rosecrans National Cemetery retained outside services to maintain its trees, or
 25 who provided such services. When Plaintiff learned that the cemetery employs Atlas Tree Service,
 26 Inc. and The Davey Tree Expert Company to maintain the trees on the property, she promptly

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 28 ¹ On July 14, 2010, the Court issued a Scheduling Order which stated, “Any motion to join
 other parties, to amend the pleadings or to file additional pleadings shall be filed and heard on or
 before December 13, 2010. [Doc. No. 9 (emphasis in original).]

1 moved to add the newly discovered companies as defendants, within the time permitted by the
2 Court's Scheduling Order.

3 Second, existing Defendant United States of America has not asserted any prejudice, and
4 does not oppose Plaintiff's motion to amend.

5 Third, the record does not suggest amendment would be futile, as the United States of
6 America has reliably identified the proposed new defendants as potentially having a role in the
7 maintenance of the trees and roots at issue.

8 Lastly, Plaintiff has not previously amended her complaint. Accordingly, each of the five
9 factors weighs in favor of granting Plaintiff's motion for leave to file an amended complaint.

10 **CONCLUSION**

11 For the reasons set forth above, the Court **GRANTS** Plaintiff's motion for leave to file a
12 first amended complaint. [Doc. No. 15.] The Clerk of Court is hereby instructed to file the
13 amended complaint, attached as Exhibit A to Plaintiff's motion [Doc. No. 15-1], and issue an
14 amended summons as to the newly identified defendants, Atlas Tree Service, Inc. and The Davey
15 Tree Expert Company.

16 **IT IS SO ORDERED.**

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18 DATED: February 1, 2011



19 Hon. Michael M. Anello
20 United States District Judge
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